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IN THE

Supreme Court of the United States

October Term, 1953
No. 12

PATRICK E. IRVINE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1953
No. 12

PATRICK E. IRVINE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

Opinions Below.

The opinion of the California District Court of Appeal, Second Appellate District, Division II, filed October 2, 1952, is reported in 113 Cal. App. 2d 460. By Minute order filed on October 15, 1952, and reported in 113 A. C. A. No. 7(3), the same court denied a Petition for Rehearing. By Minute Order filed on October 30, 1952, and reported in 39 A. C. No. 26(2), the California Supreme Court denied a Petition for Hearing, with two justices voting for the granting of the petition.

Jurisdiction.

The order of the California Supreme Court denying the Appellant's Petition for Hearing was filed October 30, 1952. Petition for Writ of Certiorari thereafter was filed in the Supreme Court of the United States, and the

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Petition for Writ of Certiorari was granted on March 9, 1953. The Petition for Writ of Certiorari, on page 2 thereof, asserted that jurisdiction of this court arises out of Title 28, Sections 2101-4, United States Code, and Rule 38½, Rules of the Supreme Court of the United States.

Statutes Involved.

The pertinent constitutional and statutory provisions appear in the Appendix, *infra,* pages 1 to 14.

Statement of the Facts.[1]

At 11:30 a.m. on November 15, 1951, Police Officer Calori saw an automobile which he subsequently learned was registered to Lippe, parked at the corner of Chestnut and Florista Streets in Los Alamitos. [Rep. Tr. pp. 73-74.] Across the street from where the car was parked, there was a white house with a real estate sign in front. [Rep. Tr. p. 74.] He watched the car and house from 11:30 a.m. until 5:30 p.m., at which time a man emerged from the white house, got into the car, and drove to Seventh and Ximeno Streets, where he proceeded west on Ximeno. [Rep. Tr. pp. 80, 81.]

On November 28, 1951, Lippe drove his Chevrolet car to 3916 East Second Street, where the petitioner lived, and parked. [Rep. Tr. pp. 82-85.] He entered the house at about 5:15 p.m. and remained there until 5:23 p.m. [Rep. Tr. p. 85.]

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[1]References to the Clerk's Transcript of the proceedings of petitioner's trial are designated as "Clk. Tr." References to the stenographic transcript of the proceedings of the trial are designated as "Rep. Tr."

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On November 29, 1951, Lippe parked his car in the vicinity of 3916 East Second Street about 5:15 p.m., entered the house at that address, and remained there until 5:30 p.m. [Rep. Tr. pp. 146, 147.]

The Key.

About December 1, 1951, Police Officer Jacobsen instructed a key maker to make a key to the petitioner's home. He received the key the next day. [Rep. Tr. pp. 516-518.]

Installation of the Microphone.

On December 1, 1951, Mr. Mason, a recording engineer, went to the premises at 3916 East Second Street, Long Beach, with police officers from the Long Beach Police Department, and strung a wire up the alley next to the premises, to a garage about three-fourths of a block away. [Rep. Tr. pp. 31, 32.] On December 3, 1951, Mr. Mason carried the wire which he had previously strung up in the alley onto the roof of the premises at 3916 East Second Street, bored a hole in the roof, stuck his wire through the roof, went downstairs and entered the house, where he crawled through a hole in the top of the closet and installed a microphone above the light fixture box in the hall. [Rep. Tr. pp. 32, 33.] He then went back to the garage, where he connected the other end of the wire to a preamplifier, and thence to a recording machine and loudspeaker which he had placed there, thereby establishing a listening post in the garage. [Rep. Tr. pp. 32-34, 42, 52.] He and his wife instructed the police officers in the operation of the equipment. [Rep. Tr. p. 34.]

There was nothing connected to the telephone instrument or lines. The equipment which was installed was

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not capable of transmitting what was said by someone telephoning into the house, unless they spoke so loudly that it could be heard in the house itself as it came out of the receiver. It was capable of transmitting what was said by anyone talking over the telephone from the house. [Rep. Tr. pp. 50, 51.]

What the Police Heard Over the Microphone and What They Saw Near the Petitioner's Home.

On December 3, 1951, Lippe parked near the house at 3916 East Second Street at 5 p.m., and left the house there at 5:20 p.m. [Rep. Tr. pp. 147, 148.]

On December 8, 1951, at about 11:58 a.m. Officer Hermansen, who was at the listening post in the garage, heard over the loudspeaker a telephone being dialed. Then the petitioner said, "Can I speak to Jamoke?" "In the first place you've got the horse down wrong." "In the 8th, 2 to win." "King's Boy, 2 to win. In the fourth, Handy Display. In the fifth, Limbo Junior, 2 to win. I've got some more for you. In the third, Clam Digger." "Fair Grounds." [Rep. Tr. pp. 234, 235.] On the same day the officers complained that there was a humming coming to them through the microphone, so Mr. Mason entered the premises at 3916 East Second Street again and moved the microphone into the bedroom. [Rep. Tr. p. 35.]

On December 11, 1951, Officer Hermansen heard over the loudspeaker somewhat after 11 o'clock in the morning the sound of a telephone being dialed, and the petitioner saying, "How you doing, Tony?" There was a pause and then the petitioner said, "Here's a parlay, 1-7, 2 across." "47-58-68-73-84-57-65-88." Then, "16-51, 1-across parlay." "17-413." And "There's a criss-cross, Fair Grounds in the third, Blue something. In the fifth,

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Blue Missus. Tropical in the first, Blue Noma, 2 to place, criss cross." [Rep. Tr. pp. 236, 237.]

On the same day, December 11, 1951, Lippe emerged from the house at Chestnut and Florista at 4:50 p.m., entered his car, and drove to 3916 East Second Street, where he entered the house there at 5:05 p.m. [Rep. Tr. pp. 85-87.] About 5:09 Officer Hermansen recognized the voice of Lippe coming over the loudspeaker at the listening post, and heard him say that there was a man outside by a box fooling around with some wires and a box; that some woman had gone out to empty some trash and had told him about it; that he had gone out right away but the man was gone. [Rep. Tr. p. 237.] He talked more about the man, and then said, "I tried to get hold of several guys and some horse had been bet and he wanted to lay off some money on the horse and he couldn't get hold of anyone to lay it off and he didn't know what to do." The petitioner said that he was going to get some new scratch sheets out of 'Frisco which had numbers on them so they could work with numbers. Lippe said, "Like the Digest?" The petitioner and Lippe talked about scratches. [Rep. Tr. pp. 238, 239.] They talked about a bet which Lippe said some man had made. While they were talking there was a sound of the telephone being dialed, and the petitioner said, "Hello, is Pete there?" [Rep. Tr. p. 239.] The petitioner then said that 2 and 2 across was right, and two across was wrong, but that when Pete had laid 4 and 4 off he laid it off right. A short time later the telephone rang and the petitioner said, "In the 6th, John Harold." Lippe said, "In the second, Skeeter," and the petitioner repeated it. Then other horses' names and different odds were mentioned. [Rep. Tr. p. 240.]

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On December 12, 1951, Officer Hermansen heard over the loudspeaker shortly before noon, a telephone being dialed. The petitioner was heard to say, "Tropical, 46, 1 and 1. Fair Grounds 22, 2 across." "If Jim calls tell him to get down here and get straightened up. I'm not going to keep books with him." [Rep. Tr. pp. 240, 241.]

On the same afternoon, Lippe's car was at Chestnut and Florista in Los Alamitos at 4:50 p.m., and at 3916 East Second Street at 5:05 p.m. [Rep. Tr. p. 149.] At 5:09 p.m., Officer Hermansen, who was listening to the loudspeaker, heard Lippe saying "2 criss crosses on the first race," and different races and horses mentioned. At 5:26 he heard the sound of a telephone ringing, and the petitioner saying, "In the fourth, Bar Annie; in the 6th, Chorus Girl. Paid $13.60, $6.90, $4.80. Yeah. And the 7th ran out." [Rep. Tr. pp. 242, 243.]

On December 13, 1951, at 11:35 a.m. Officer Hermansen heard the petitioner on the loudspeaker saying, "That's 2 across. Here's some for McComb. Tropical in the 4th, Man of the Hour. Here's some for Mace, 2 across, Bay Meadows, 16, 514, 67, 73, 84, 87. Bay Meadows, 84, 1 and 1. Tropical 45, 1 and 1, and 1 and 1 parlay. Tropical, 17, 1 and 1. Fairgrounds 67, 1 and 1. Bay Meadows, 69, 1 and 1. Tropical, 410, 1 and 1, and 1 and parlay." "Bay Meadows, 2 to place, criss cross." [Rep. Tr. pp. 243, 244.] At 5:15 p.m. on the same day, Lippe emerged from the white house at Chestnut and Florista, got in his car and drove to 3916 East Second Street, arriving there at 5:30 p.m. He entered the house. [Rep. Tr. pp. 87, 88.] At 5:32 Officer Hermansen who was listening to the loudspeaker, heard Lippe say, "You took away everything he booked and we had some good action." "Paid him $151.00. It shows on my scratch sheet." The peti-

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tioner said, "Without scratching, how do you get five-sixty?" Then other numbers and quarter horse races were mentioned. The petitioner said, "Tim made that $30.00 bet." [Rep. Tr. pp. 244, 245.] Lippe left the petitioner's house at 5:45 p.m. [Rep. Tr. p. 88.]

On December 14, 1951, Lippe's car was parked near Chestnut and Florista at 5 p.m. He was seen in the car in the vicinity of the petitioner's home at 5:45 p.m. He went into the house. [Rep. Tr. p. 150.]

On December 15, 1951, Lippe left the house at Chestnut and Florista at 5:25 p.m. and drove to 3916 East Second Street, where he entered the house there. [Rep. Tr. p. 88.] At 5:45 p.m. Officer Hermansen, who was listening at the loudspeaker, heard the petitioner talking about someone hitting a parlay and waving a scratch sheet in his face. He said, "It's bad enough for the son-of-a-bitch to hit you with a limit horse without waving a sheet in your face." "Two horses paid the limit." "Get a late paper tonight and lock it up. I'm going to be gone and won't be back until 7 or 8 tomorrow night." Lippe said, "I'll get an Examiner." The petitioner said, "Good night, Jamoke." [Rep. Tr. pp. 246, 247.]

At 11:23 a.m. on December 17, 1951, the sound of a telephone being dialed came to Officer Hermansen over the loudspeaker. The petitioner said, "How you doing, Jamoke?" "Just give him whatever he wants to hold on his sheets. There's no giving him an individual layoff. If he don't want it, then to hell with him. You're rid of it as far as my book is concerned." [Rep. Tr. pp. 247-249.]

At 2:55 p.m. on the same afternoon, December 17, 1951, Lippe's automobile was parked at 3916 East Second Street. [Rep. Tr. pp. 89, 100.] At 2:55 p.m. Officer

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Hermansen, who was listening at the loudspeaker, heard Lippe say, "I gave him six across." The petitioner said, "Would you give him more than six?" Lippe said, "No." Then the petitioner said, "When you lay it off my books it is through with my books as far as that is concerned." Lippe said, "Well, you really wanted me to lay 12 and 12 across of didn't you?" The petitioner said, "You are not going to give him 12 off across off my sheet just to satisfy him." Lippe said, "Bob only wanted 15 across, and Bruce had enough on that horse so he called Pete and asked him how much he wanted off." The petitioner said, "Pete's book and my book are two separate books." Lippe said, "Then Pete only got half of the $16." The petitioner said, "That's right. Pete had $16 showing but I gave him only $8 which is his share." "Pete's book is separate from my books just the same as Joe Irvine's book is separate from my book." "Listen, Jamoke, let me tell you again. When you lay off my book it is through with my book as far as that is concerned. My book is separate from Pete Curti's book." "In fact, don't give him any more." "This is a separate book altogether." "I am not broke yet." "I am thinking of financing another book." [Rep. Tr. pp. 250, 251.] The same persons talked more about lay-offs. [Rep. Tr. pp. 159, 163-167.] At 3:15 p.m. Lippe's car left 3916 East Second Street. [Rep. Tr. pp. 89, 100.]

On December 18, 1951, at about 3:05 p.m. Lippe entered his car at Chestnut and Florista and drove to 3916 East Second Street, arriving there about 3:20 p.m. [Rep. Tr. pp. 89-91, 150.]

On December 24, 1951, Curti's automobile was parked at the intersection of Chestnut and Florista in Los Ala-

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mitos. Later it was parked at 3916 East Second Street. [Rep. Tr. p. 151.]

On December 26, 1951, at about 11:42 a.m., Officer Hermansen heard a voice coming over the loud speaker at the listening post. The petitioner said, "How are you doing, Pete? Tropical in the eighth. Rough Cookie." He mentioned Tropical in the ninth, and said, "Here's some more for Mace. Tropical, 5.13, one and one, 66, one and one, 86, one and one, 91, one and one, one and one, round robin. Fair Grounds. 31, one and one, 51, one and one, and one and one round robin. On the fourth. Okay, Pete." [Rep. Tr. pp. 251, 252.]

On December 27, 1951, at 11:25 a.m., Officer Hermansen heard the petitioner's voice over the loudspeaker at the listening post saying, "Pete." Then "T-43, five to win, five to place. Keen, 15 to win, Burr five to win. 59, 15.22, 35, 52." [Rep. Tr. pp. 252, 253.] At 3 p.m. on that day, Curti's car was parked in front of the white house at Chestnut and Florista. [Rep. Tr. pp. 92, 93.] Later Curti drove to 3916 East Second Street where he entered the house there at about 3:30 p.m. [Rep. Tr. pp. 93, 94.] At about 3:25 p.m. Officer Hermansen, from the loudspeaker at the listening post, heard the petitioner and Curti talking. The petitioner said, "Is this all of them?" Curti said, "We do pretty good in the mornings." "It will be all right as soon as they take the new machine over, won't it, Pat?" The petitioner said, "They paid the tax today and $52 in the layoff plus tax." Curti said, "That other woman had the same deal going on. I gave Joe a little." [Rep. Tr. pp. 254, 255.] Curti left at 3:48 p.m. [Rep. Tr. p. 94.]

On December 28, at about 12:01 p.m., Officer Hermansen heard through the loudspeaker a telephone being dialed,

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and the petitioner saying, "How're you doing, Pete? Tropical, 37, 64, 9.11, 96, one and one criss-cross. Whitman, one to place, criss-cross." "You made a mistake on Nelson. You paid him 7.20 for the $5 he bet and that 7.20 was payment for only $2." [Rep. Tr. pp. 255, 256.]

At 2:53 p.m. on the same date, Officer Hermansen heard a telephone ring over the loudspeaker, and the petitioner say, "I can't quit. No, I can't quit." "I still have the same people playing." "Some of them don't play as much." He mentioned the name "Doc" and said, "I will call out and tell them that you are okay. When you call out call 908976 or 81403 if the first one is busy." [Rep. Tr. p. 257.] Immediately after these statements of the petitioner, there was the sound over the loudspeaker of a telephone being hung up and then being dialed. Then the petitioner said, "A Doc Cosgrove might call you. He is okay in case he calls. He usually bets in the 20's." [Rep. Tr. pp. 257, 258.] At 5:12 p.m. Curti got into his car on Chestnut and Florista and drove to 3916 East Second Street, where he entered the house at 5:20 p.m. and left at 5:40 p.m. [Rep. Tr. p. 105.]

Again on December 28, 1951, Mr. Mason entered the premises at 3916 East Second Street and moved the microphone to a place behind the wall of the closet, boring a hole in the wall in order to do so. [Rep. Tr. p. 36.]

On December 29, 1951, Curti, accompanied by a woman, drove from Florista and Chestnut Streets to 3916 East Second Street. They entered the house at that address and remained inside about 20 minutes. [Rep. Tr. pp. 151, 152.]

On December 31, 1951, at noon, officers who were on duty at the listening post heard, over the loudspeaker, a telephone being dialed and the petitioner saying, "Hi,

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you, Ruth. I just called to see how you figured you had anything coming on that one dollar to win bet." "In the third race he ran out. He was with Tapebuster. So Tapebuster was out." "He got two horses in the fourth race mixed up. He probably made a mistake writing it down." "Told him not to write it down, but he keeps on doing that." "Got a new man out there, but he won't be with me very long. I am going to replace him. It will take about a week to get a new man broken in." "Contact." "So he made a mistake. I intend to pay you for the parlay. Pete wound up wrong in writing it out. A difference of $9.30." [Rep. Tr. pp. 258, 259.] About 12:18 on the same day the sound of the telephone being dialed again came over the loudspeaker, and the petitioner was heard to say, "How're you doing, Pete? Here's one for McCombs." "Here's some for Mason. In the Tropical, Woodman, Fairgrounds. 3.11, one and one, 37, one and one; and on Ruth, give her $9.30 more. Okay, Pete." [Rep. Tr. pp. 259, 260.]

At 5:26 p.m. on the same date, December 31, Curti's voice was heard over the loudspeaker. He said, "That lady made two more bets today." "Another woman made a $2 bet. Today that lady bet her $4 back. She won 80¢. I will have to give you $3.20. She won't pay no tax." "The place is hard to find without the Christmas tree lit up." "Give me my figures what I owe you in the morning, that is with everything." "You know that groceryman named Bailey; he won't be home tomorrow." "This guy starts betting again." "I gave this lady her $9 credit." "That son of a bitch wins every day." "Three $50 tickets." [Rep. Tr. pp. 260, 261.]

On January 2, 1952, Curti drove his car from the front of the white house at Chestnut and Florista at 5:22 p.m.

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[Rep. Tr. p. 107.] At 5:35 p.m. Officer Hermansen, who was listening at the loudspeaker in the listening post, heard Curti say, "Yeah, he beat you pretty good. We got a bum break in the last race. Lots of action." He mentioned the word "scratch." Then he said, "He threw it in the wastepaper basket. Yes, I know who he is." He mentioned horses and layoffs. Then he said, "No, that is your ticket." The petitioner said, "It wouldn't be Ruth?" Curti said, "No." "It ain't mine." The petitioner said, "I will make you pay tax if you don't cross it off." "$24. Take $8 off of this. When you get a scratch mark it clear off. You had 3.90, 11.40 and 12.10." The sound of an adding machine came over the loudspeaker, and Curti said, "Yes. I just put it down that way." "Just put it down that way. That guy said he would see you in the morning, that service guy." "I got a copy of all the tickets, and eight from 24 is 16. There is the difference." The petitioner said, "Make it lose 11.40 instead of 9.40." [Rep. Tr. pp. 261, 262.] "Lose a dollar apiece," said Curti, "I still don't see how you do it, Pat." The petitioner said, "Here's your tax over here." Curti said, "Yes, I see how you do it now. Yeah. That is how some of the guys want their damned tickets." The petitioner said, "That wouldn't be Rucker?" Curti said, "I will find out for you. I will go right on by." The petitioner said, "Wouldn't be Cosgrove, Norm, 705, Naomi, P. C., Holt, Gilly." Curti said, "No, it wouldn't be Gilliam. He is dead." Curti then said, "I will find out in about 15 minutes. Mason got two tickets." The petitioner said, "It wouldn't be Margo, Bertha." Curti said, "It is a man. I know P.C. got a ticket. Calls in early in the morning." A clock chimed six times. Several minutes later the sound of a telephone being dialed came over the loudspeaker, and Curti said, "I will be

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there in about 15 minutes. I am at Pat's and I will have to go by the club." [Rep. Tr. pp. 262, 263.] Curti's car left the petitioner's home at 6:05 p.m. [Rep. Tr. p. 107.]

On January 3, 1952, Curti's car left Chestnut and Florista at 3:40 p.m., and was parked near the petitioner's house at 3:55 p.m. It remained there until 4:28 p.m. [Rep. Tr. p. 108.]

On January 4, 1952, Curti and a woman were seen in his Ford in the vicinity of Chestnut and Florista at 5:20 p.m. They went to the petitioner's home, where they parked and went upstairs. The left at 6 p.m. [Rep. Tr. pp. 108, 109.]

At 11:54 a.m. on January 5, 1952, officers on duty at the listening post, heard the sound of a telephone being dialed coming over the loudspeaker. Then the petitioner said, "How're you doing, Pete? Yeah. That is all we can do. Here's a parlay for McCombs in the third. Dr. Ifroo, Tropical." "Number 7 to the seventh. Little Falls. Four across parlay. Santa Anita in the second, Tingaling. One to place and one to show. That is all of them." [Rep. Tr. p. 265.]

How the Police Put Fluorescent Powder on the Betting Markers.

Officer Gautt and other officers agreed upon a plan of operation in connection with stopping Curti's car. [Rep. Tr. p. 153.] Commencing at 5:35 p.m. on January 5, 1952, Officer Gautt followed Curti, who was in his Ford, from Chestnut and Florista in Los Alamitos. [Rep. Tr. p. 153.] At 7th and Pacific Coast Highway he passed Curti and drove directly in front of him to 7th and Park Avenue, where officers were waiting for his signal that he and Curti had arrived. When he gave the signal, two

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motorcycle officers and a patrol car with Officers Jacobsen and Dulaney in it, followed the two cars to Ximeno and Fourth, where they stopped them. One of the motorcycle officers approached Gautt's car, and Gautt got out with his hands up. The other officer pulled up alongside of Curti's car, and the patrol car drew up in back of it. [Rep. Tr. pp. 154, 155, 338, 339, 401-403.] Gautt was searched for weapons, and one was found in his belt. [Rep. Tr. p. 156.] The officer took Gautt back to the patrol car, where he remained. [Rep. Tr. p. 156.]

While Gautt was being searched by the motorcycle officers, Officer Dulaney asked Curti to get out of his car. He did so, and his passenger, Audie Greer, did so too. She was carrying a coat on her arm, and there were a number of pieces of paper under it. [Rep. Tr. pp. 340, 403.] Officer Jacobsen asked her to put the articles on the front seat of the car, and she did so. [Rep. Tr. pp. 404, 406.] Officer Dulaney searched Curti, and took some pieces of paper, on which there were numbered lines and pencilled writings, from his shirt pocket. [Rep. Tr. p. 341.] Dulaney put these papers on the front seat of Curti's car. [Rep. Tr. p. 343.] Officer Jacobsen then leaned into Curti's car and went through the papers which had been put on the front seat, attempting to touch each of them and impregnate it with white crystalline powder, which was fluorescent under ultra-violet rays, which he had on his hands. [Rep. Tr. pp. 339, 340, 344, 345, 402, 407, 408, 416-419.]

The officers searched the rest of Curti's car. [Rep. Tr. p. 409.] They told him that they were stopping all late model Fords of a fairly dark color, as they were looking for a liquor store robber. [Rep. Tr. pp. 346, 347.] The officers gave Curti permission to leave, so he and Audie Greer got into his car and drove away. [Rep. Tr. p. 409.]

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That same evening, over the loudspeaker, Curti was heard telling about having been stopped by the police, and about the other person in a similar car who had also been stopped. Curti said that some fellow had won on four jockeys. [Rep. Tr. p. 229.] The petitioner said he had won 8.80, but it cost him $3. Curti said that he owed him on that sheet, and they talked about sheets and horses. Curti talked some more about having been stopped by the police. [Rep. Tr. p. 230.] The sound of an adding machine was heard. [Rep. Tr. p. 231.] Curti and Audie Greer left the petitioner's house and drove away about 7 p.m. [Rep. Tr. p. 410.]

The Arrest—What the Officers Found.

Officers Jacobsen and Kennedy then entered the petitioner's home, put him under arrest, and searched the premises. [Rep. Tr. p. 410.] In a drawer in a desk in his bedroom they found 46 pieces of paper of the same size, shape and texture as those which had been on the front seat of Curti's car that evening. [People's Ex. 20; Rep. Tr. pp. 411, 682.] Before Officer Jacobsen touched the papers, Inspector Kennedy picked them up and they were put under an ultra-violet light. Under that light they showed a greenish purple color, just as did the powder which Officer Jacobsen had put on his hands prior to handling the papers in Curti's car. [Rep. Tr. pp. 411-416, 683, 684.] In the opinion of Officer Jacobsen, who was familiar with the paraphernalia, signs, symbols and characters commonly used by bookmakers in the community in making a book on horses, the pencil writing on all but one of these papers showed on each the name of a bettor, the bets made on specified horses, and the amounts won or lost by that bettor on January 5, 1952, the date on

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which, in his opinion, the bets were made. [Rep. Tr. pp. 375-382, 421-424.] The sheet which was different was an accounting sheet. [Rep. Tr. p. 583.] In the opinion of an examiner of questioned documents [Rep. Tr. pp. 722-726], the handwriting on the 46 pieces of paper was that of Curti and Audie Greer. [Rep. Tr. pp. 760, 761.]

A small sheet of paper [People's Ex. 21], was found on top of the desk in the petitioner's house at the time of the arrest. [Rep. Tr. p. 424.] In the opinion of Officer Jacobsen it was a betting marker. At the top it had a capital "M" and a small "c." These letters, in his opinion, indicated the name of the player. On the left side was the letter "T," which, in his opinion, stood for Tropical, and Tropical was a racetrack where horse races were allegedly being run during the period of investigation here. [Rep. Tr. pp. 394, 425.] Following the "T" was a small dash and the figure "3," which indicated the third race at Tropical. Written in longhand was the name of the horse, "Dr. Ifroo." Immediately under the name "Dr. Ifroo" was "T-7," followed by the name of a horse, "Little Falls." Those two horses were grouped together with a bracket, which indicated that it was a parlay. [Rep. Tr. pp. 425, 426.] Following the names of the two horses were three figure "4's," indicating 4 to win, 4 to place and 4 to show, which was a parlay, in his opinion, from Dr. Ifroo in the third race at Tropical, to Little Falls in the 7th race at Tropical. Under these items was "C-2," and the name "Tingaling." In Officer Jacobsen's opinion the "C" stood for the California track running at the time, which was Santa Anita; the "2" for the second race; and "Tingaling" the horse bet on. Following that was the letter "x" followed by two figure "1's." In the opinion of Officer Jacobsen the "x" indicated that the

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person betting did not want to bet any money to win, but wanted to bet one dollar to place and one to show. [Rep. Tr. p. 426.] An identical series of entries was found on one of the 46 sheets of paper [People's Ex. 20], which were found in the desk drawer. At the top of those entries were the words "Mack" and "McComb." [Rep. Tr. pp. 426-428.] In the opinion of an examiner of questioned documents [Rep. Tr. pp. 722-726], the handwriting on the small sheet of paper [People's Ex. 21] was that of the appellant. [Rep. Tr. pp. 756, 757.]

Curti was arrested on the same evening that the petitioner was. [Rep. Tr. p. 347.] At that time the arresting officers took from him a racing form and several pieces of vertically and horizontally ruled papers on which there were pencilled writings [People's Ex. 16], which in the opinion of the examiner of questioned documents, had been made by Curti. [Rep. Tr. pp. 341, 347, 348, 759, 760.] One of the 46 sheets of paper found in the petitioner's home was a recapitulation of the figures on the sheets taken from Curti. [Rep. Tr. pp. 583, 584.] In the opinion of Officer Jacobsen, the notations on the papers taken from Curti were bets recorded on horse races. [Rep. Tr. p. 575.]

In the petitioner's home at the time of his arrest were also found a number of horizontally and vertically ruled sheets similar to others introduced into evidence, and spiral notebooks. [Rep. Tr. pp. 430, 433-435.] A daily racing form dated Saturday, January 5, 1952, on which there were pencilled notations, was found on the petitioner's bed. [Rep. Tr. pp. 434, 435.] An adding machine and a tape with figures on it were also found. [Rep. Tr. pp. 435-437.]

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Fluorescence on the Petitioner's Hands.

The officers asked the petitioner to put his hands under ultra-violet light to see whether or not they would fluoresce as the papers discovered in his home had. The petitioner did so, and laughed. His hands, when he held them under the light had the same green fluorescence as the papers had. [Rep. Tr. pp. 414-416, 524, 525, 710.]

The Los Alamitos House.

While Officer Jacobsen was at the petitioner's house on the night of the arrest, Officer Stovall telephoned to him from the house at Chestnut and Florista in Los Alamitos. [Rep. Tr. pp. 584, 630, 631.] He gave two telephone numbers to Officer Jacobsen. Officer Jacobsen then telephoned to 908976, and Officer Stovall answered the telephone. Jacobsen then called 81403 and Officer Stovall answered. [Rep. Tr. pp. 586, 631.]

In one room of the house at Chestnut and Florista in Los Alamitos were found two telephones, the numbers of which were 81403 and 908976, each with a cord approximately 70 feet long. [Rep. Tr. pp. 627-632.] On the night of January 5, 1952, officers found in that room a large number of ruled and numbered blank pieces of paper, a book entitled "Racing Parlay Manual," and one entitled "Parlay Payoff," a table model radio, a small adding machine, and numerous old scratch sheets. There was also a scratch sheet dated January 5, with pencilled writings on it, a ledger, horizontally and vertically lined papers having written notations on them, multicolored pencils and papers. [Rep. Tr. pp. 641-648.] In the opinion of Officer Jacobsen, the paraphernalia commonly used and employed by bookmakers in the community were

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telephones, radios, scratch sheets, racing forms, paper, pencils, racing manuals or racing parlay manuals, betting markers, wall sheets, television sets and adding machines. [Rep. Tr. pp. 383-385.]

The Wagering Tax Stamps.

At the police station after the petitioner's arrest, Officer Good removed from his wallet a paper labelled "Special Tax Stamp, Wagering," bearing the name "Irvine, Patrick E.," and the address "3916 E. Second Street, Long Beach, California," in typewriting, dated "11/5/51." [Rep. Tr. pp. 564-566.] It was offered into evidence at the trial. The introduction into evidence was objected to on the ground that the purchase of the stamp was charged as the first overt act of the conspiracy charged in Count I of the Information; that there was a federal law which the petition was complying with in purchasing it; and that therefore its purchase did not constitute an illegal act which was an overt act of the conspiracy. The objection was overruled and the stamp was received as People's Exhibit 36. [Rep. Tr. pp. 566, 567.]

The Wagering Tax Records.

Photostatic copies of documents, certified to as correct copies of documents in his files by the head of the Wage and Excise Tax Division of the Office of the Collector of Internal Revenue, were offered into evidence, and their introduction was objected to by the petitioner on the grounds that they were not the best evidence and there was no proof that the originals could not be acquired; that there was no proof of where they came from; and that there was no proof that they were actually signed by anyone concerned in the trial. The objections were over-

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ruled. [Rep. Tr. pp. 729, 730, 736, 737, 738-740.] In the opinion of an examiner of questioned documents, one of the documents, an application for a wagering tax stamp [People's Ex. 63], was signed by the petitioner. [Rep. Tr. pp. 740-742.] Others of such documents [People's Exs. 64, 65, 66] including tax returns for the period in question here, had, in the opinion of the examiner of questioned documents, been signed by the petitioner. [Rep. Tr. pp. 741, 742.] Others of the documents had, in the opinion of the examiner of questioned documents, been signed by Morris Lippe and Pete Curti, persons alleged in the information to have conspired with the petitioner to engage in bookmaking. [Clk. Tr. p. 1; Rep. Tr. pp. 742-745, 748-750; People's Exs. 67 (document dated November 1st only), 68, 71. 72.] Some of the documents were received as evidence only against alleged members of the conspiracy other than the petitioner. [Rep. Tr. pp. 745, 747, 748; People's Exs. 67 (document dated March 8, 1952), 69, 70.] The jury found each of the alleged conspirators not guilty of the conspiracy charged in Count I of the information. [Clk. Tr. pp. 26, 27.]

The Prosecution.

In an information filed by the District Attorney of Los Angeles County, the petitioner, along with Morris Lippe and Pete Emil Curti, was charged in Count I with conspiracy to violate California Penal Code, Section 337a, and it was alleged as an overt act that pursuant to the conspiracy the three defendants had purchased and obtained Special Wagering Tax Stamps [Clk. Tr. p. 1], along with other overt acts. [Clk. Tr. pp. 2, 3.] In Count II it was charged that they violated California Penal Code, Section 337a, subdivision 1, by willfully, un-

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lawfully and feloniously engaging in poolselling and bookmaking; in Count III it was charged that they violated California Penal Code, Section 337a, subdivision 2, by keeping premises at 10851 South Chestnut, Los Alamitos, and at 3916 East Second Street, Long Beach, with paraphernalia for the purpose of recording and registering bets on horse races; in Count IV they were charged with a violation of California Penal Code, Section 337a, subdivision 3, in receiving money and the equivalent and memorandum therefor in writing, which had been wagered or was to be wagered on horse races; and in Count V they were charged with a violation of California Penal Code, Section 337a, subdivision 4, in recording and registering bets on horse races. [Clk. Tr. pp. 2-4.]

Each defendant pleaded "Not Guilty as charged in each count of the information," and they were tried by a jury. [Clk. Tr. pp. 9-25.] The jury found each defendant not guilty of the conspiracy charged in Count I of the information, and found the appellant guilty of each of the other counts of the information. [Clk. Tr. pp. 26-29, 109-113.] His motion for a new trial was denied [Clk. Tr. p. 115], and judgment was entered as to all counts. He was sentenced to the county jail for one year on the conviction on Count II, and for six months for each other count. His sentence on Count III was ordered to run consecutively with that on Count II. Execution of sentence was suspended as to Counts III, IV and V, and he was granted probation for three years on those counts. [Clk. Tr. pp. 116, 117.]

The petitioner appealed to the District Court of Appeal, Second Appellate District, from the judgment and the order denying his motion for a new trial. The judgment was affirmed. (*People v. Irvine,* 113 Cal. App. 2d 460.)

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Summary of Argument.

I.

Congress has specifically provided that payment of wagering taxes does not exempt the person paying them from penalties imposed by State laws. Therefore, the petitioner could properly be penalized under State laws for engaging in wagering contrary to State law. Furthermore, the question of whether or not a person who pays the taxes imposed upon wagers and wagering by the United States Government is entitled to carry on the activity so taxed without interference from the State is not properly presented by the record, as it was not raised in nor passed upon by the highest State court.

II.

The freedom from compulsion to be a witness against oneself is not an element of due process of law guaranteed by the Fourteenth Amendment, and the guarantee thereof secured by the Fifth Amendment is not a guarantee against State action. Therefore, the use by a State court of evidence so secured is not by reason of such compulsion only, a denial of any constitutional right of the accused. (*Adamson v. California,* 332 U. S. 46, 53-54; *Twining v. New Jersey,* 211 U. S. 78, 99-114.)

The privilege against self-incrimination relates only to past acts. Therefore the petitioner in applying for and receiving a wagering tax stamp was not compelled by the federal government to incriminate himself, as the application and the stamp related only to acts which he might

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or might not do in the future. (*United States v. Kahriger,* 345 U. S. 22, 32-33; *United States v. Penn,* 111 Fed. Supp. 605, 606-607.)

As the wagering tax stamp, the application therefor, and the other records concerning the wagering tax were evidence resulting from a federal matter over which the state had no control, their use against the petitioner did not deprive him of any constitutional right not to be a witness against himself. (*Feldman v. United States,* 322 U. S. 487, 492-494.)

Further, the question of whether or not the introduction of the wagering tax stamp and records compelled the petitioner to be a witness against himself is not properly presented by the record, as no such claim was made at any step in the proceeding in the State court, and the matter was not passed upon by the highest State court.

III.

California Penal Code, Section 334, did not grant the petitioner immunity from the prosecution here, as the immunity granted by that section is granted to a witness as such who testifies for the prosecution. The petitioner here did not testify, and did not claim such immunity in the State court at any step in the proceeding. (*In re Petracus,* 12 Cal. 2d 579.)

Further, the question whether statutory immunity was or should have been granted to the petitioner by California Penal Code, Section 334, is not properly presented by the record, as no claim to such immunity was made

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in the State courts at any stage in the proceeding, and it is not a federal question of which this Court will take cognizance.

IV.

The evidence secured against the petitioner by the police was not secured by any means contrary to the fundamental principles of justice which inhere in our institutions. As it was otherwise competent, it was admissible in the California court even though it may have been obtained by improper or illegal means. (*People v. Gonzales,* 20 Cal. 2d 165, 168-171; *People v. Mayen,* 188 Cal. 237, 240-257; *Schwartz v. Texas,* 344 U. S. 199, 201; *Wolf v. Colorado,* 338 U. S. 25, 33.) The search and seizure at the time of the arrest was a reasonable search and seizure.

V.

As no wires were tapped, nor telephone communications intercepted, no question arises as to the application of 47 U. S. C., Section 605, or California Penal Code, Section 640. (*Goldman v. United States,* 316 U. S. 129, 133-134; *People v. Sica,* 112 Cal. App. 2d 574, 586.) Even though telephone communications had been intercepted, the evidence secured by such acts would have been admissible against the petitioner. (*Schwartz v. Texas,* 344 U. S. 199; *People v. Channell,* 107 Cal. App. 2d 192, 198-199.)

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ARGUMENT.

I.

Payment of the Federal Wagering Taxes Does Not Exempt the Person Paying Them From Any Penalty Imposed by a State for Wagering.

A. Congress Has Specifically Provided That Payment of Wagering Taxes Does Not Exempt the Person Paying Them From Penalties Imposed by State Laws.

The petitioner contends that as Congress has lawfully imposed a tax on the occupation of wagering, it has thereby made that occupation impervious to State regulation, because, he insists, the State is forbidden to burden the taxing power of the federal government without the specific consent of Congress, which he asserts has not been given.

Chapter 27A of the Internal Revenue Code imposes a tax of 10% on wagers (26 U. S. C., Sec. 3285), and requires that a special tax of $50.00 a year shall be paid by each person liable for the 10% tax or who is engaged in receiving wagers on behalf of any person so liable. (26 U. S. C., Sec. 3290.) The same chapter makes applicable (26 U. S. C., Sec. 3292) a provision that payment of the $50.00 special tax on the occupation of wagering "shall not be held to exempt any person from any penalty or punshment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State . . ." (26 U. S. C., Sec. 3276.)

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It provides also that "payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law . . . of any State for engaging in the same activity, . . ." (26 U. S. C., Sec. 3297.)

Congress has, therefore, by the provisions set forth above, specifically disclaimed any intention to interfere with the State's rights to regulate and prohibit wagering within the State, and the petitioner's contention that it has not consented to such regulation and prohibition is contrary to the fact.

In the *License Tax Cases,* 5 Wall. 462, the controversy arose out of indictments for selling lottery tickets and retailing liquor without having first got and paid for a license as provided by an Internal Revenue Act of Congress. It was argued that a license to carry on those activities gave authority to carry them on; that the activities were part of the internal trade of the State in which they were carried on; that the internal trade of the State was not subject to legislation by Congress and could not be licensed or prohibited by its authority; that licenses for such activities granted under the Act of Congress were therefore null and void; and that penalties for carrying on such activities without a license were unconstitutional. The court there pointed out that where Congress has constitutional power to regulate trade or intercourse, such as the power to regulate commerce with foreign nations and among the several states, it might do so by means of licenses, and that in those cases the license would give

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the licensee authority to do whatever was authorized by its terms. It distinguished the situation involving the internal commerce or domestic trade of the States, and recognized that Congress had no power of regulation nor direct control over it, except as was incidental to the exercise of powers clearly granted to it, such as the power to tax, which was concerned here. (5 Wall. 462, 470-471.) In determining that the Internal Revenue Act conveyed to the licensee no authority to carry on the licensed business within the State, the court stated:

> ". . . Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it.
>
> "If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.
>
> "But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of im-

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posing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it." (5 Wall. 462, 471.)

In *Pervear v. The Commonwealth,* 5 Wall. 475, decided immediately following the *License Tax Cases* (5 Wall. 462), *supra,* the plaintiff in error was indicted in the State court for keeping a tenement for the illegal sale of intoxicating liquors, contrary to the law of the State. He pleaded that he had a license from the United States under the Internal Revenue Acts of Congress to do the acts for which he was indicted. The court held, applying the rule of the *License Tax Cases* (5 Wall. 462), *supra,* that the sale of liquors within the State was subject exclusively to State control, and that the license secured under the acts of Congress conveyed no authority to carry on the business within the State.

It need not be determined here whether or not Congress is constitutionally impowered to regulate as well as tax, and so authorize the occupation of wagering within the States, because Congress has not attempted to do so. (*United States v. Kahriger,* 345 U. S. 22, 26-27.) Rather, it has expressly provided that the payment of the taxes imposed by it on wagering shall not exempt any person carrying on the business of wagering from any penalty or punishment provided by State laws for doing so (26 U. S. C., Sec. 3297), and that payment of the $50.00 tax on those engaged in receiving wagers does not authorize the carrying on of such activity contrary to State law. (26 U. S. C., Secs. 3276, 3292.)

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B. The Question of Whether or Not a Person Who Pays the Federal Taxes on Wagers and Wagering Is Entitled to Carry on That Activity Without Interference From the States Is Not Properly Presented by the Record.

The federal question put forward by the petitioner is whether or not the laws of the State prohibiting wagering must, by virtue of Article VI of the United States Constitution, give way to the Act of Congress taxing wagering. This question was mentioned in the trial court in connection with an objection to the introduction of evidence of conversations emanating from the petitioner's home through a concealed microphone on the ground that the evidence was secured by a violation of the Fourth and Fourteenth Amendments. The fact that a wagering stamp had been issued to the petitioner was said to involve a federal question in the case at trial, which would make the doctrine of the case of *Rochin v. California,* 342 U. S. 165, applicable. The objection to the evidence was overruled. [Rep. Tr. pp. 110-119.] Introduction into evidence of a wagering tax stamp issued to Morris Lippe, an alleged co-conspirator, which was found in the petitioner's home, was objected to on the ground that it showed an act condoned by the United States Government. The objection was overruled. [Rep. Tr. pp. 428, 429.] The introduction into evidence of the wagering tax stamp issued to Patrick E. Irvine, which was found in the petitioner's wallet after his arrest, was objected to on the ground that the purchase of the stamp was charged as the first overt act of the conspiracy charged in Count

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I of the information; that there was a federal law which the petitioner was complying with in purchasing it, and that therefore its purchase did not constitute an illegal act which was an overt act of the conspiracy. The objection was overruled and the stamp was received as People's Exhibit 36. [Rep. Tr. pp. 566, 567.] The jury trying the case was instructed as to what was required by the federal laws taxing wagering, and told that the payment of the tax did not exempt any person from any penalty or punishment provided by the laws of the State, as the special tax stamp was not a license or permit. [Clk. Tr. pp. 72, 73.] The question was not again presented in the State courts or decided by them, either on motion for new trial, on appeal to the District Court of Appeal for the State of California, Second Appellate District, Division Two, on petition for rehearing by that court, or on petition for hearing by the California Supreme Court, as would have been possible. (See *People v. Harrington,* 42 Cal. 165.) Neither does it appear to have been presented on a petition for a writ of habeas corpus, which is a proper way to raise the question of the constitutionality of a State statute under which one is being punished. (*In re Bell,* 19 Cal. 2d 488, 492-495.) The denial of the claim was urged specifically in the Petition for Certiorari filed in this court, but, we submit, that was too late, and that there is no occasion for this court to consider the question. (*Capterton v. Bowyer,* 14 Wall. 216, 234-236; *Hulburt v. Chicago,* 202 U. S. 275, 280-281; *Hiawasee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U. S. 341, 343-344; *Chicago, Indianapolis & Louisville Railway Co. v. McGuire,* 196 U. S. 128.)

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II.

The Petitioner Was Not Compelled by the State to Be a Witness Against Himself, and No Right Guaranteed to Him by the Fifth or Fourteenth Amendments Was Denied Him by the Use of Federal Wagering Tax Records as Evidence Against Him.

A. The State Did Not Deny the Petitioner the Due Process of Law.

The petitioner contends that he was compelled by the federal law taxing those engaged in the occupation of wagering to make a declaration that he was engaged in that business, and that the use of such declaration and the Special Tax Stamp issued pursuant thereto, as evidence against him in the prosecution by the State for wagering constituted a denial to him of the due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, because he was forced to incriminate himself.

(1) The Freedom From Compulsion to Be a Witness Against Oneself Is Not an Element of Due Process of Law.

The freedom from compulsion to be a witness against oneself is not an element of due process of law guaranteed by the Fourteenth Amendment, and the guarantee thereof secured by the Fifth Amendment is not a guarantee against State action. The use by a State of evidence so secured is not by reason of such compulsion alone, a denial of any constitutional right of the accused. (*Twining v. New Jersey,* 211 U. S. 78, 99-114; *Adamson v. California,* 332 U. S. 46, 53-54; and see *Feldman v. United States,* 322 U. S. 487, 492-494; *United States v. Murdock,* 284 U. S. 141, 149.)

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(2) THERE WAS NO SELF-INCRIMINATION WITHIN THE MEANING OF THE FIFTH AMENDMENT HERE.

The privilege against self-incrimination relates only to past acts. The federal wagering tax statutes merely impose conditions upon the right to engage in the business of receiving wagers in the future, and the disclosures required thereby do not constitute self-incrimination within the meaning of the Fifth Amendment, even though they tend to incriminate the person making them under State law. (*United States v. Kahriger,* 345 U. S. 22, 32-33; *United States v. Forrester* (D. C. Ga.), 105 Fed. Supp. 136, 138.)

(3) THE PETITIONER WAS GRANTED THE DUE PROCESS OF LAW REQUIRED BY THE FOURTEENTH AMENDMENT.

In setting forth the requirements of the due process clause of the Fourteenth Amendment, the court in *Rochin v. California,* 342 U. S. 165, stated at page 169:

> ". . . Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Commonwealth of Massachusetts, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' Palko v. State of Connecticut, 302 U. S. 319, 325."

In *Feldman v. United States,* 322 U. S. 487, it was held that the admission of testimony previously given by the accused in proceedings in a State court designed to aid in the discovery of assets of a debtor, did not deprive the accused of the right to refuse to be a witness against

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himself in a prosecution by the federal government for using the mails to further a fraudulent scheme, even though such testimony could not have been used against him in a State proceeding because of immunity which was granted by State statutes. It was there stated, at 322 U. S. 487 at 493:

> ". . . The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the government."

It was not suggested in the *Feldman* case, 322 U. S. 487, *supra,* that the appellant was being denied the due process of law guaranteed to him by the Fifth Amendment, even though the federal government used evidence which the defendant had been compelled by the State to give.

And see:

United States v. Murdock, 284 U. S. 141, 149;
Brown v. Walker, 161 U. S. 591, 606-608;
Jack v. Kansas, 199 U. S. 372, 380-382.

26 U. S. C., Section 3275, made applicable to those who pay wagering taxes by 26 U. S. C., Section 3292, provides that each Collector shall place and keep in his office, for public inspection, a list of the names of all persons who pay the tax, and the time, place and business for which the tax has been paid. It also provides that he shall furnish a certified copy thereof, as of a public record, upon application of any prosecuting officer.

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In a great many decisions of State courts, decided during a period of over thirty years, it was held in prosecutions for violating state laws prohibiting or regulating the sale or keeping of intoxicating liquor, almost without exception, that evidence that the accused had a United States special internal revenue stamp showing payment of the federal tax on liquor dealers, or other evidence that he had paid the tax, was admissible to show violation of the State laws,[1] and, indeed, in some states statutes made possession of such revenue tax stamp *prima facie* evidence of the sale or keeping of prohibited liquor.

We submit that the use of such evidence, approved by the courts of at least twenty-five states, and to some de-

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[1]See, *e. g.*, Alabama: *Roden v. State*, 3 Ala. App 199; *Baker v. State*, 5 Ala. App. 156; *Strange v. State*, 5 Ala. App. 164; *Warrick v. State*, 8 Ala. App. 391; *Tarpey v. State*, 8 Ala. App. 432; Arizona: *Birch v. State*, 19 Ariz. 366. Arkansas: *Siebert v. State*, 121 Ark. 258. Georgia: *Huckabee v. State*, 7 Ga. App. 677; *Christian v. State*, 9 Ga. App. 61; *Cassidy v. State*, 10 Ga. App. 123; *Jackson v. State*, 10 Ga. App. 142; *Daniel v. State*, 11 Ga. App. 199. Illinois: *People v. Brown*, 273 Ill. 169. Kansas: *State v. Nippert*, 74 Kan. 371; *State v. Dollar*, 88 Kan. 346; *City of Topeka v. Briggs*, 90 Kan. 843. Kentucky: *King v. Commonwealth*, 143 Ky. 125. Louisiana: *State v. Donato*, 127 La. 394. Maine: *State v. O'Connell*, 82 Me. 30; *State v. Howard*, 91 Me. 396. Maryland: *Guy v. State*, 90 Md. 29. Massachusetts: *Commonwealth v. Uhrig*, 146 Mass. 132. Michigan: *People v. Lalonde*, 171 Mich. 286. Mississippi: *Burnett v. State*, 72 Miss. 994. Missouri: *State v. Sexton*, 141 Mo. App. 694; *State v. Parkel*, 185 Mo. App. 70. Nebraska: *Fruide v. State*, 66 Neb. 244. New Hampshire: *State ex rel. Bartlett v. Davis*, 69 N. H. 350. North Carolina: *State v. Dowdy*, 145 N. C. 432. North Dakota: *State v. Kilmer*, 31 N. D. 442. Ohio: *Folliard v. State*, 32 Ohio Cir. Ct. R. 481. Oklahoma: *Billingsley v. State*, 4 Okl. Cr. 597; *Hargrove v. State*, 8 Okl. Cr. 487; *Moulder v. State*, 10 Okl. Cr. 252. Rhode Island: *State v. Mellor*, 13 R. I. 666. Tennessee: *Diamond v. State*, 123 Tenn. 348; *Brinkley v. State*, 125 Tenn. 371. Texas: *Pitner v. State*, 37 Tex. Cr. R. 268; *Columbo v. State*, 65 Tex. Cr. 608. West Virginia: *State v. Nethken*, 60 W. Va. 673. Vermont: *State v. Spaulding*, 60 Vt. 228; *State v. White*, 70 Vt. 225. Virginia: *Runde v. Commonwealth*, 108 Va. 873.

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gree furnished by the tax collector as a public record (26 U. S. C., Sec. 3275), cannot be said to flout the constitutional guarantee of respect for personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," or are "implicit in the concept of ordered liberty." Nothing compels a person to engage in the occupation of wagering, for which the federal tax must be paid and the tax stamp secured. Therefore, one who chooses to do so and to apply for and secure the stamp does so voluntarily, and the information he gives in so doing is given without compulsion. No element of due process forbids, we submit, the use against him of evidence voluntarily furnished, such as that on the federal tax stamp application, and the stamp. (See: *Tucker v. United States,* 151 U. S. 164, 168-169; *Perlman v. United States,* 247 U. S. 7.) Therefore, the court here did not deny the petitioner the due process of the law in admitting such application and stamp.

B. The Question of Whether or Not the Introduction of the Wagering Tax Records Compelled the Petitioner to Be a Witness Against Himself or Denied Him Due Process Is Not Properly Presented by the Record, as No Such Question Was Raised at Any Step in the Proceedings in the State Court.

The question of whether or not the introduction of the wagering tax records compelled the petitioner to be a witness against himself or denied him the due process of law, is not properly presented to this court for consideration. Such question was never raised in the California courts at any step in the proceedings, and was never passed upon by any court in that State.

The only question of self-incrimination there raised was with regard to whether or not asking the appellant to put

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his hands under an ultra-violet lamp, which he did laughingly, and which resulted in evidence that they showed the presence of fluorescent powder which had previously been put upon certain betting markers, compelled him to be a witness against himself. It was held that he acted voluntarily and was not compelled to do anything. (*People v. Irvine,* 113 Cal. App. 2d 460, 463.)

The only objection to the introduction of the wagering tax stamp into evidence was on the ground that the first overt act charged in support of the conspiracy was the purchase of the stamp; and that in buying it the petitioner was complying with the federal law; that it was not an illegal act; and that it was, therefore, not an overt act in the conspiracy. The objection was overruled. [Rep. Tr. pp. 566, 567.] The petitioner was found not guilty of the conspiracy. [Clk. Tr. pp. 26, 109.]

A photostatic copy of the application for the wagering stamp, certified to be a correct copy of a document in his files by the head of the Wage and Excise Tax division, was marked for identification as People's Exhibit 63 for identification, and an examiner of questioned documents was asked if he had studied it. An objection to the witness testifying from the photostat was made on the ground that it was a copy and not the best evidence, and there was no proof that the original could not be acquired; and that while it appeared to be a government report of some kind, there was no identification as to where it came from, when it was issued, or if it was issued in the regular and due course of business in taxation or tax stamps. [Rep. Tr. pp. 729, 730.]

It was pointed out that the document had not been offered into evidence yet. A further objection was made

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to the deputy district attorney's reading the document into the record. After some discussion of that objection, the objection was overruled. [Rep. Tr. p. 730.] Subsequently, the examiner of questioned documents was asked for his opinion with respect to the handwriting on the application as compared with that on some exemplars. The question was objected to on the ground that the witness was not qualified as an expert. The objection was overruled, and a continuing objection to the witness' opinion evidence was allowed. A further objection was made that the photostatic copy was not the best evidence. [Rep. Tr. pp. 736, 737.] The application [People's Ex. 63] and other tax records were received into evidence. [People's Exs. 64-74; Rep. Tr. p. 738.]

The petitioner was allowed a continuing objection to them. He moved to strike the exhibits on the ground that it had not been proved that they were in the handwriting of any of the defendants. The court denied the motion, and subsequently the examiner of questioned documents testified that in his opinion the application had been signed by the petitioner. [Rep. Tr. pp. 740, 741.]

At no time was any objection to the introduction of the stamp and the application therefor made on the ground that they forced the petitioner to be a witness against himself, or that they denied him due process of the law. No complaint upon any ground was made to the appellate courts over the admission of these documents into evidence. Therefore, we submit, as the federal question concerning the admission of the wagering tax stamp and the application therefor into evidence was not presented to the highest court in California, it is not properly pre-

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sented to this court for consideration. (*Caperton v. Bowyer*, 14 Wall. 216, 234-236; *Hulburt v. Chicago*, 202 U. S. 275, 280-281; *Hiawasee River Power Co. v. Carolina-Tennessee Co.*, 252 U. S. 341, 343-344; *Chicago, Indianapolis & Louisville Railway Co. v. McGuire*, 196 U. S. 128.)

III.

The Petitioner Was Not Granted Immunity From Prosecution by State Law.

A. California Penal Code, Section 334, Grants Immunity From Prosecution Only as to Matters Testified to by a Witness for the Prosecution.

The petitioner asserts that his wagering tax stamp and application therefor, as well as evidence of his statements which were heard through a microphone which had been placed in his house without his knowledge, and were testified to by police officers, were his own testimony, and that the introduction thereof into evidenec by the prosecution granted him immunity from the prosecution by virtue of the provisions of California Penal Code, Section 334, which is as follows:

> "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

The Supreme Court of California, in the case of *In re Petraeus*, 12 Cal. 2d 579, held that Penal Code, Section 334, *supra*, applies only to a witness called by the prosecution, as in such case alone that compulsion is present

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which is a necessary element of the immunity system prescribed by the laws. It pointed out that it was not the legislative purpose in enacting the law to extend the immunity to situations wherein the State is assumed to have bargained to give all without any return, forgetting the *quid pro quo* in the matter of granting immunity; namely, information leading to the arrest and conviction of offenders.

The petitioner was not a witness at his trial, and he was not compelled by the State to make the application for the wagering tax stamp or to receive the stamp, nor was he compelled to produce those documents or identify them. He did not claim immunity in the State courts by virtue of this statute. Any assumption that the State by introducing the documents into evidence had thereby granted immunity to the petitioner for the very crimes for which he was on trial would be an unwarranted extension of the statutory immunity beyond the scope intended by the legislature in enacting Penal Code, Section 334. (*In re Petraeus* (12 Cal. 2d 579), *supra.*)

No question of self-incrimination arises respecting the conversations heard over the microphone. There was no evidence of compulsion to induce the petitioner to talk. He and his co-defendants were voluntarily transacting business without knowledge of the fact that they were being overheard through the microphone. This is not self-incrimination within the Fifth Amendment (*Olmstead v. United States,* 277 U. S. 438, 462), and it is not testimony of the petitioner as a witness for the prosecution such as grants him immunity under California law. (*In re Petraeus* (12 Cal. 2d 579), *supra.*)

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B. There Is No Federal Question Involved in Whether or Not the Petitioner Was or Should Have Been Granted Immunity by California Penal Code, Section 334.

> ". . . Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' These principles are applicable alike in all the states and do not depend upon or vary with local legislation." (*Hebert v. Louisiana*, 272 U. S. 312, 316-317.)

Thus, whether or not the State immunity statute was applicable here was a State question, the final decision of which rested with the courts of California. The question of whether or not the petitioner was or should have been immune from the prosecution because of Penal Code, Section 334, was not raised at any step in the proceedings in the California courts. No court of the State was asked to or did rule on the applicability of the statute to the situation here. Under these circumstances, we submit that there is no occasion for this court to consider the matter. (*Hebert v. Louisiana* (272 U. S. 312), *supra.*)

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IV.

The Due Process Clause of Neither the State nor Federal Constitution Prohibited the Use of the Evidence Obtained by Entering the Petitioner's House and Placing a Microphone Therein and Thereafter Listening to People Talking Within the House; or by Placing Fluorescent Powder Upon Betting Markers in the Hands of Another Person, and Thereafter at the Time of the Petitioner's Arrest, Showing That There Was Fluorescent Powder on His Hands.

At the request of the police, a keysmith went to the appellant's home and made a key to the front door. [Rep. Tr. pp. 516-519.] Thereafter the police and a recording engineer entered the house in the absence of the appellant and installed a microphone in the hall. The microphone was connected to a recording machine and a loudspeaker some distance away. [Rep. Tr. pp. 31-34.] There was nothing connected to the telephone instrument or lines, and the equipment which was installed was not capable of transmitting what was said by someone telephoning into the house, unless they spoke so loudly that it could be heard in the house itself as it came out of the receiver. It was capable of transmitting what was said by anyone talking in the house, whether into the telephone or not. [Rep. Tr. pp. 50, 51.] Twice subsequently they entered the house and changed the location of the microphone. [Rep. Tr. pp. 35, 36.] The police listened to voices emanating from the house, through the microphone and loudspeaker. [Rep. Tr. pp. 159, 163-167, 229-231, 234-265.] At times they heard a telephone ringing or being dialed, and the appellant alone talking [Rep. Tr. pp. 234-237, 239-241, 243, 244, 247-249, 255-260, 265], and once Curti talking. [Rep. Tr. p. 63.]

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Subsequently, the police, by pretending to look for a robber, stopped the car driven by one of the petitioner's co-defendants and, without his knowledge, placed powder, which fluoresced under ultra-violet rays, upon betting markers found in his car. [Rep. Tr. pp. 153-156, 338-347, 401-409, 416-419.] He was then allowed to go on his way [Rep. Tr. p. 409], and shortly afterwards he was heard talking in the petitioner's house. [Rep. Tr. p. 29.] The police then entered the petitioner's house with their key and arrested him. [Rep. Tr. pp. 410, 515, 516, 703.] They asked him to put his hands under a portable ultra-violet lamp which they brought in, and, laughing, he did so. Fluorescence showed on his hands. [Rep. Tr. pp. 414-416, 524, 525.]

The police officers testified to the conversations concerning bookmaking which they had heard over the loudspeaker, and about the fluorescent powder put on the betting markers and found on the petitioner's hands. [Rep. Tr. pp. 228, 236, 237, 240-248, 250, 252, 254-265, 414-416.]

The petitioner asserts that the entry of the officers into the house was for the purpose of wire tapping, which is a felony in California (Cal. Penal Code, Sec. 640), and which is also forbidden by federal law. (47 U. S. C., Sec. 605.) He contends that therefore the entry was burglarious, because it was for the purpose of committing a felony (Cal. Penal Code, Sec. 459), and that the use of evidence secured by means of such a crime is so shocking as to violate the fundamental principles of justice that inhere in our institutions, and for that reason should have been excluded from evidence. He also contends that faking the arrest of the petitioner's co-defendant in

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order to put fluorescent powder on his betting markers, and subsequently entering the petitioner's house without his consent and compelling him to exhibit his hands to them, was conduct on the part of the officers so "offensive to human dignity in securing evidence from a suspect" as to be forbidden by the Fourteenth Amendment to the Constitution and its use ostracized. (App. Op. Br. pp. 42-50.)

It should be noted first that there was no evidence whatsoever that the police tapped any telephones, or attempted or intended to, or that any of the evidence presented was secured by intercepting telephone communications by wire tapping. The evidence shows that there was nothing connected to the telephone instrument or lines, and that the equipment which was installed was not capable of transmitting what was said by those telephoning to the petitioner's house, unless the voice came out of the receiver so loud that it would be picked up by the microphone in the room. [Rep. Tr. pp. 50, 51.] Police Officer Hermansen, who testified to almost all of the conversations heard over the loudspeaker, testified that he had never heard both ends of any telephone conversation from the petitioner's home. [Rep. Tr. p. 272.] No other witness testified that he had heard both ends of any such conversation, nor testified to both ends. The evidence shows only that the police heard, through the microphone installed in the petitioner's house, a telephone ringing or being dialed, and then a voice talking, on several occasions. Listening to the words spoken into the telephone receiver, in the absence of a physical connection with the telephone wires, is not an interception of a wire communication within the meaning of 47 U. S. C., Section 605

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(*Goldman v. United States*, 316 U. S. 129, 133-135), nor within the meaning of California Penal Code, Section 640. (*People v. Sica*, 112 Cal. App. 2d 574, 586.)

A. In California, Evidence Otherwise Competent Is Not Rendered Inadmissible by the Fact That It Might Have Been Obtained by Improper or Illegal Means. Evidence Obtained by Unreasonable or Unlawful Search and Seizure Is Admissible in California Courts.

The rule is well settled in California that evidence otherwise competent is not inadmissible because it has been obtained by improper or illegal means. Therefore, evidence obtained by unreasonable or unlawful search and seizure is admissible in California courts.

In the case of *People v. Gonzales*, 20 Cal. 2d 165, police officers, without warrants, entered the defendant's apartment during his absence and took therefrom certain evidence of a conspiracy to commit grand theft. Thereafter, the defendants were charged with that crime. Before the trial they got an injunction against the use of the evidence, but at the trial, the court refused to enforce the injunction and admitted the evidence in question. The California Supreme Court held that the evidence was admissible, declaring (20 Cal. 2d 165, 168-171):

> "The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and seizures by federal officers. Pursuant to this mandate the federal courts forbid the introduction in court of evidence obtained by an illegal search or seizure if a timely motion for its exclusion is made by the accussed. (Byars v. United States, 273 U. S. 28 (47 S. Ct. 248, 71 L. Ed. 520); Go-Bart Importing Co. v. United States, 283 U. S. 344 (51 S. Ct. 153, 75 L. Ed. 374); Gouled v. United States, 252

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U. S. 298, 302 (41 S. Ct. 261, 65 L. Ed. 647); Silverthorne Lumber Co. v. United States, 251 U. S. 385 (40 S. Ct. 182, 64 L. Ed. 319); Boyd v. United States, 116 U. S. 616 (6 S. Ct. 524, 29 L. Ed. 746); Weeks v. United States, 232 U. S. 383 (34 S. Ct. 341, 58 L. Ed. 652); Nardone v. United States, 308 U. S. 338 (60 S. Ct. 266, 84 L. Ed. 307); Ex parte Jackson, 96 U. S. 727, 733 (24 L. Ed. 877); Amos v. United States, 252 U. S. 313 (41 S. Ct. 266, 65 L. Ed. 654); Agnello v. United States, 269 U. S. 20 (46 S. Ct. 4, 70 L. Ed. 145).) The California Constitution contains an identical provision (Cal. onst., art. I, sec. 19), but the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence. (People v. Mayen, 188 Cal. 237 (205 Pac. 435, 24 A. L. R. 1383); *In re* Palizzotto, 188 Cal. 410 (205 Pac. 676); People v. Le Doux, 155 Cal. 535 (102 Pac. 517); Herrscher v. State Bar, 4 Cal. (2d) 399 (49 P. (2d) 832). See cases cited in 88 A. L. R. 348.) The defendant may have civil and criminal remedies against the officers for their illegal acts (see Pen. Code, sec. 146; Silva v. MacAuley, 135 Cal. App. 249 (26 P. (2d) 887, 27 P. (2d) 791); Ryan v. Crist, 23 Cal. App. 744 (139 Pac. 436); 15 So. Cal. L. Rev. 139, 141 *et seq.*), but the state is not precluded from using the evidence obtained thereby.

"The Fourth Amendment to the Constitution of the United States is not a limitation upon the states (National Safety Deposit Co. v. Stead, 232 U. S. 58 (34 S. Ct. 209, 58 L. Ed. 504); Ohio v. Dollison, 194 U. S. 445 (24 S. Ct. 703, 48 L. Ed. 1062)), and California is free to interpret its own Constitution. Defendants contend, however, that the prohibition in

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the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the federal Constitution, however, fall within the concept of due process of law. (Palko v. Connecticut, 302 U. S. 319 (58 S. Ct. 149, 82 L. Ed. 288); Twining v. New Jersey, 211 U. S. 78 (29 S. Ct. 14, 53 L. Ed. 97); Snyder v. Massachusetts, 291 U. S. 97 (54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575); See 39 Harv. L. Rev. 431; 24 Harv. L. Rev. 366.) In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures' may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. (See cases cited in 16 C. J. S., pp. 1185 *et seq.*) There is a failure to observe 'that fundamental fairness essential to the very concept of justice' when a trial is but a pretense (Lisenba v. California, 314 U. S. 219,

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236 (62 S. Ct. 280, 290, 86 L. Ed. .....)), as a trial dominated by a mob (Moore v. Dempsey, 261 U. S. 86 (43 S. Ct. 265, 67 L. Ed. 543)), or when the defendant is denied the right to counsel (Johnson v. Zerbst, 304 U. S. 458 (58 S. Ct. 1019, 82 L. Ed. 1461)), or when his conviction results from testimony known by the prosecution to be perjured. (Mooney v. Holohan, 294 U. S. 103 (55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406)) or from an involuntary confession obtained through coercion or torture. (Chambers v. Florida, 309 U. S. 227 (60 S. Ct. 472, 84 L. Ed. 716); Brown v. Mississippi, 297 U. S. 278 (56 S. Ct. 461, 80 L. Ed. 682).) While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (Chambers v. Florida, *supra;* Brown v. Mississippi, *supra;* Lisenba v. California, *supra.* See Bram v. United States, 168 U. S. 532 (18 S. Ct. 183, 42 L. Ed. 568)), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (Chambers v. Florida, *supra;* Brown v. Mississippi, *supra;* Lisenba v. California, *supra; cf.* Twining v. New Jersey, *supra.*) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (People v. Defore, 242 N. Y. 13 (150 N. E. 585); People v. Mayen, *supra;* Com. v. Donnelly, 246 Mass. 507 (141 N. E. 500); Johnson v. State, 152 Ga. 271 (109 S. E. 662, 19 A. L. A. 641).) The fact that an officer acted improperly in obtaning evidence presented at the trial in no way precludes the court

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> from rendering a fair and impartial judgment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (8 Wigmore, Evidence (3rd ed.), sec. 2183, p. 5, and cases there cited.)"

Stated otherwise, the California courts have consistently held that the Fourth Amendment to the Constitution of the United States, relating to searches and seizures, applies only to the Federal Government and its agencies, and that evidence obtained in violation of Article I, Section 19 of the California Constitution, which prohibits unreasonable searches and seizures, is admissible in California courts, for, they declare, where competent evidence is produced on a trial, the courts will not stop to inquire or investigate the source from whence it came or the means by which it was obtained.

People v. Mayen, 188 Cal. 237, 240-251.[1]

Illegally obtained evidence is admissible in California courts whether it is taken from the defendant's premises

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[1]Accord: *People v. Kelley,* 22 Cal. 2d 169, 172-173; *Herrscher v. State Bar,* 4 Cal. 2d 399, 412; *In re Polizzotto,* 188 Cal. 410, 411; *People v. LeDoux,* 155 Cal. 535, 547; *People v Allen,* 115 Cal. App. 2d 745, 747; *People v. Curley,* 114 Cal. App. 2d 577, 582-583; *People v. Channell,* 107 Cal. App. 2d 192, 199; *Oil Workers' International Union v. Superior Court,* 103 Cal. App. 2d 512, 578-580; *People v. Raffington,* 98 Cal. App. 2d 455, 457; *People v. Harmon,* 89 Cal. App. 2d 55, 58; *People v. Richardson,* 83 Cal. App. 2d 302, 305; *People v. Jackson,* 80 Cal. App. 2d 386, 391; *People v. Chait,* 69 Cal. App. 2d 503, 552; *People v. Peak,* 66 Cal. App. 2d 894, 904-905; *People v. Beilfuss,* 59 Cal. App. 2d 83, 87-88; *People v. Wong Toy,* 131 Cal. App. 455, 456; *People v. Guido,* 93 Cal. App. 478, 479; *People v. Eiseman,* 78 Cal. App. 667, 669; *People v. Warren,* 12 Cal. App. 730, 732; *People v. Swaile,* 12 Cal. App. 192, 196.

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(*In re Polizzotto*, 188 Cal. 410, 411; *People v. Orcck*, 74 Cal. App. 2d 215, 217-218) or from his person. (*People v. Wren*, 59 Cal. App. 116, 117; *People v. Martin*, 70 Cal. App. 271.)

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." (*Wolf v. Colorado*, 338 U. S. 25, 27-28.)

California accepts this concept as binding and acknowledges that its citizens are entitled to have this guarantee adequately protected by the laws of California.

In securing this guarantee to citizens, the federal government has since 1914 by virtue of the *Weeks* case, 232 U. S. 383, secured these rights to citizens by forbidding the introduction into evidence in federal courts of material obtained as a result of an illegal search and seizure.

California has consistently refused to follow the rule of the *Weeks* case, 232 U. S. 383, *supra*.

From *People v. Mayen*, 188 Cal. 237, to *People v. Gonzales*, 20 Cal. 2d 165, the California courts have admitted in evidence material obtained as a result of illegal search.

Not only have the California courts rejected the *Weeks* doctrine, but the California legislature has joined in that rejection. Mr. Justice Carter in his dissenting opinion in the *Rochin* case (*People v. Rochin*, 101 Cal. App. 2d at p. 144) emphatically announced:

> ". . . I am asking the Legislature of California to enact legislation which will force the courts of this state to uphold the constitutional provisions (U. S.

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Const., 4th Amend.; Cal. Const., art I, sec. 19) guaranteeing the right of privacy to residents of this state."

Mr. Justice Carter asked and the legislature rejected the request.

Three bills were introduced in the 1951 Legislature which would have in effect made the rule in the *Weeks* case, 232 U. S. 383, *supra,* the rule in California. None of the bills was enacted into law.

The Supreme Court of the United States in *Wolf v. Colorado,* 338 U. S. 25, after a full review of the entire subject held that although the guarantees are binding on the states, the failure on the part of a state to implement these guarantees by the adoption of the rule in the *Weeks* case, 232 U. S. 383, *supra,* did not constitute a deprivation of due process. This rule was repeated in *Stefanelli v. Minard,* 342 U. S. 117.

The reason underlying the difference between the federal (as expressed in the *Weeks* case) and the state rule (as allowed in the *Wolf* case, 338 U. S. 25, *supra*), finds its basis in history.

The early common law did not recognize search warrants, but they crept into the law, as it is said, by "imperceptible degrees" for the purpose of searching for stolen goods. With the growth of the inquisitorial procedure of the Star Chamber there grew up, however, a practice of allowing the secretary of state to issue general warrants for the search of libels. The power was expressly conferred by the licensing acts, but it survived their expiration. The issue on searches and seizures came to a head in the 1760s when John Wilkes and certain

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others were arrested for seditious libel. Out of these proceedings two important rules of law emerged. The first concerned the validity of general warrants, the second the validity of special warrants to search for and seize private papers.

The warrant under which Wilkes was arrested was issued by Lord Halifax, principal secretary of state under George III, ordering all "His Majesty's officers, civil and military, and loving subjects whom it may concern" to "make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper" and to bring them in "together with their papers" for examination. A search warrant could scarcely have been phrased in more inclusive terms. The question of its validity was not passed upon in the Wilkes habeas corpus proceeding which followed, nor was it clearly determined, although it was discussed both by counsel and the justices, in the damage suit of Dryden Leach against three of the King's Messengers. Shortly after these cases, however, the House of Commons by resolution declared all general warrants to be illegal "except in cases provided by act of Parliament."

James Otis' thundering condemnation in Boston in 1761 of the odious writs of assistance, "instruments of slavery on the one hand and villainy on the other," preceded by two years the arrest of Wilkes. The controversy over searches and seizures was therefore under way in the colonies before it came to a head in England. But writs of assistance for the apprehension of smugglers and the seizure of customable goods were expressly authorized by act of Parliament, whereas the warrants involved in the English cases were sanctioned neither by the common law nor by statute.

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The issue over writs of assistance was one of the flames that lighted the American Revolution. When therefore the state conventions that ratified the federal constitution in 1787-1788 clamored for amendments that would safeguard individual liberties against the government, it was natural that protection against unreasonable searches and seizures should have been thought of. Hence, the Fourth Amendment, which among others, was proposed by the First Congress in 1789 and ratified by the states two years later:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Closely related to this declaration both in point of fact and in judicial interpretation is the provision against self-incrimination in the Fifth Amendment:

"Unreasonable searches and seizures" is manifestly an elastic phrase, subject to no precise definition and therefore to considerable latitude in interpretation. The result is that American law upon this subject offers considerable diversity and tendency to vagary. Even where searches and seizures are admittedly illegal the problem of the best means of giving effect to the constitutional guaranty presents itself. The federal courts as well as the courts of more than a third of the states have held the view that the only sufficient means by which the protection can be truly realized is by a refusal on the part of the courts to receive at trial evidence that has been acquired by the

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government as a result of an unreasonable search and seizure. This they hold is the only safeguard that will restrain over-zealous government enforcing officers.

A majority of the state courts, however, take a different view. They hold that evidence of crime is evidence no matter how it has been secured and that the culprit should not go free because his constitutional rights have been abused. As it has been put by Justice Cardozo, the criminal should not go free "because the constable has blundered" (*People v. Defore,* 242 N. Y. 13.) The courts point out that the aggrieved citizen has other remedies against the offending officer. He may, for example, resist the officer who illegally invades his privacy or he may sue him for damages or prosecute him for oppression or ask that he be removed or otherwise disciplined by his superiors.

As was pointed out in the *Wolf* case, 338 U. S. 25, *supra,* the remedies by which the arbitrary conduct of the officers should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

The rule of decision in California is the common law of England as it stood in the year 1850 (*Martin v. Superior Court,* 176 Cal. 289). At common law the remedy against an unlawful search and seizure was an action of trespass. In England from the time of *Leach, Entick and Wilkes* [1763] (19 How. State Trials, 1002, 1030, 1154) to *Ellias v. Pasmore* (K. B. 1934, Vol. 2) this was considered sufficient. In 1763 Wilkes recovered from the

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King's Messenger 1,000 pounds—no mean sum then or now. In the *Ellias* case, K. B. 1934, Vol. 2, *supra*, Sir Stafford Cripps, K.C., recovered 40 pounds and costs on behalf of the members of the National Unemployed Workers.

In California, following the common law tradition, the citizen has secured to him the same protection for his right to immunity from unlawful searches and seizures. This remedy is not only theoretical—it is an actuality. In *Stern v. Superior Court*, 76 Cal. App. 2d 772, the District Court of Appeal ordered the trial court to return to Stern the sum of $6.000 taken from him as the result of an illegal search and seizure. *Silva v. MacAuley*, 135 Cal. App. 249, is authority for the proposition that an officer who acts in excess of his authority is liable to answer in damages and affirmed an award of $428 on account of the illegal seizure of crabs. Such liability extends not only to the officer immediately involved but to his principal and his bondsmen as well. (*Abbott v. Cooper*, 218 Cal. 425.)

Wirin v. Horrall, 85 Cal. App. 2d 497, is another example of adequate relief from illegal searches.

What was said in the *Wolf* case, 338 U. S. 25, *supra*, about the securing of the guarantees implicit in "the concept of ordered liberty" and "due process" was earlier stated by the United States Supreme Court in *Hebert v. Louisiana*, 272 U. S. 312 at 316:

> ". . . What it [due process] does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

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The doctrine in *Wolf v. Colorado*, 338 U. S. 25, *supra*, has been lately reiterated in the case of *Stefanelli v. Minard*, 342 U. S. 117 at 120, as follows:

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, *e. g.*, 28 U. S. C. §§1341, 1342, 2283, 2284(5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a State's enforcement of its criminal law."

The difference between the remedy in the *Weeks* case, 232 U. S. 383, *supra*, and the remedy as provided by California and a majority of the states finds a basis in reason as well as in history.

Wilkes and Leach and Entick had no quarrel with the local peace officers. They were victims of a political persecution carried on by the central government.

Otis and the founding fathers thundered against the officers of the crown and not against the local colonial peace officers.

The Fourth and Fifth Amendments were aimed at the correction of abuses of authority by a strong central government fresh in the memory of those who participated in

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the activities of the bodies which ratified the new constitution and demanded the amendments.

The "patrolman on the beat" will never be a part of a "gestapo." The *Wolf* case, 338 U. S. 25, *supra*, recognizes this fact and points out that the local police are more amenable to local control and less likely to be the adjuncts of political and religious persecutions.

As Mr. Justice Jackson said in his dissenting opinion in *Brinegar v. United States*, 338 U. S. 160, 181:

> ". . . This inconsistency does not disturb me, for local excesses or invasions of liberty are more amenable to political correction, the Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source."

Another point remains to be considered. The objects introduced in evidence were gambling equipment.

The seizure in this case by the police was legal and within the following language of *Harris v. United States*, 331 U. S. 145, 154:

> "Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime. Clearly the checks and other means and instrumentalities of the crimes charged in the warrants

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toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers."

B. The Due Process Clause of the Fourteenth Amendment Does Not Require the Exclusion of Evidence Obtained by Unreasonable Search and Seizure.

(1) IN A PROSECUTION IN A STATE COURT FOR A STATE OFFENSE, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF EVIDENCE OBTAINED BY UNREASONABLE SEARCH AND SEIZURE.

The first eight amendments to the Constitution of the United States, known as the Bill of Rights, are not binding upon the states, but are restrictions only upon the Federal Government.

Barron v. Baltimore, 7 Pet. 242, 249-250;
Spies v. Illinois, 123 U. S. 131, 166;
Brown v. New Jersey, 175 U. S. 172, 174;
Twining v. New Jersey, 211 U. S. 78, 93;
Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 447;
Feldman v. United States, 322 U. S. 487, 490;
Adamson v. California, 332 U. S. 46;
Wolf v. Colorado, 338 U. S. 25, 26.

Adoption of the Fourteenth Amendment did not incorporate and make the first eight amendments to the United States Constitution operative in the states on the ground that the rights protected by those amendments are privi-

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leges and immunities of citizens of the United States or elements of the due process of law protected by that amendment.

Maxwell v. Dow, 176 U. S. 581, 587-602;
Twining v. New Jersey, 211 U. S. 78, 90;
Palko v. Connecticut, 302 U. S. 319, 323;
Wolf v. Colorado, 338 U. S. 25, 26.

Therefore, in a prosecution in a State Court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

Wolf v. Colorado, 338 U. S. 25, 33.

(2) The Conduct of the Police Officers in Securing Evidence Here Did Not Make the Use of Such Evidence a Denial of Due Process of Law Guaranteed by the Fourteenth Amendment.

Federal cases cited by the appellant which state that evidence secured by unlawful search and seizure is inadmissible in federal courts (*Boyd v. United States,* 116 U. S. 616; *Byars v. United States,* 273 U. S. 28; *Trupiano v. United States,* 334 U. S. 699; *Gouled v. United States,* 255 U. S. 298; *United States v. Jeffers,* 342 U. S. 48; *Silverthorn Lumber Co. v. United States,* 251 U. S. 385; *District of Columbia v. Little,* 178 F. 2d 13; and *Neuslein v. District of Columbia,* 115 F. 2d 690) are inapplicable to the situation here, as the federal courts have, by judicial implication, ruled that evidence so secured is not admissible, although the Fourth Amendment does not specifically so require. The United States Supreme Court has consistently refused to hold that the basic right to protection against arbitrary intrusion by the police, pro-

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tected by the Fourteenth Amendment, demands the exclusion of relevant evidence in state courts merely because it was obtained by an unreasonable search and seizure.

Wolf v. Colorado, 338 U. S. 25, 29-33;
Schwartz v. Texas, 344 U. S. 199, 201.

Other cases cited by the petitioner also have no application here. *Feldman v. United States,* 322 U. S. 487, held that testimony which the defendant was compelled to give in a state proceeding could be used against him in a federal proceeding; *On Lee v. United States,* 343 U. S. 747, held that none of the defendant's rights were infringed by use against him of conversations which he had with an informer, which had been heard over a radio by an officer to whom they were transmitted by a transmitter on the informer's person; *Lisenba v. California,* 314 U. S. 219, held that while the use of coerced confessions was forbidden by the Fourteenth Amendment, the triers of fact had determined on conflicting evidence that the confession had not been coerced, and the Supreme Court would not say that the triers of fact were wrong; in *McNabb v. United States,* 318 U. S. 332, however, it was held that the coerced confession could not be used; *Goldman v. United States,* 316 U. S. 129, held that evidence secured by placing a listening device on the outside of the wall of the defendant's office was admissible, and its use not a violation of the principles of the Fourth Amendment; *Olmstead v. United States,* 277 U. S. 438, held that evidence secured by tapping telephone wires outside of the defendant's premises was admissible, as there had been no search or seizure within the Fourth Amendment; *Zap v. United States,* 328 U. S. 624, held that no unlawful search and seizure had been carried on; *Chambers v. Florida,* 309

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U. S. 227; *White v. Texas,* 310 U. S. 530, and *Ashcraft v. Tennessee,* 327 U. S. 274, all held that the confessions introduced into evidence were obtained by means proscribed by the Fourteenth Amendment, and convictions obtained by their use could not be sustained; in *Betts v. Brady,* 316 U. S. 455, the defendant was denied counsel, but it was held that under the particular facts none of his constitutional rights had been denied him; *Sorrells v. United States,* 287 U. S. 435, was concerned with entrapment of the defendant by a federal officer; *Nardone v. United States,* 302 U. S. 379, held that communications secured by wire tapping were inadmissible in evidence because of the provisions of 47 U. S. C. 605; and *Rochin v. California,* 342 U. S. 165, held that securing evidence from the defendant's body by means of a stomach pump violated the Fourteenth Amendment, as such proceedings did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. . . . They are methods too close to the rack and the screw to permit of constitutional differentiation."

We have no entrapment, denial of counsel, or coerced confessions here. Listening to what is said in a person's house through a listening device is not in and of itself an unreasonable search and seizure, or conduct which shocks the conscience, as illustrated by the holdings in *Goldman v. United States,* 316 U. S. 129, *supra; On Lee v. United States,* 343 U. S. 747. Use of evidence secured by police officers when they enter a defendant's home illegally does not deprive the defendant by reason of the illegal entry alone of the due process of law. (*Wolf v. Colorado,* 338 U. S. 25, 33; *Stefanelli v. Minard,* 342 U. S. 117, 122.) Here we have an entry into the petitioner's

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house, the placing of a microphone therein, and the subsequent gathering of evidence by use of the microphone. This is no more than seizure of evidence after an illegal entry, and the use of such evidence has been held not to deprive the accused of any right of due process of law guaranteed by the Fourteenth Amendment.

Wolf v. Colorado, 338 U. S. 25, 33;
Stefanelli v. Minard, 342 U. S. 117, 122;
Schwartz v. Texas, 344 U. S. 199, 201.

The activities of the police in surreptitiously placing flourescent powder on the betting markers in the possession of one of the petitioner's codefendant did not invade any interest of the petitioner. He was not in any way affected by those activities. When the police, after his arrest, asked him to put his hands under the ultra-violet lamp, he did so voluntarily, and laughed while he did it. [Rep. Tr. pp. 414-416, 524, 525.] No physical or mental coercion or promises were used to persuade him to do it. He did not hesitate or demur. As the evidence that he had fluorescent powder on his hands, was secured by his voluntary act, the petitioner cannot complain of its use. The respondent submits that there is no similarity whatsoever between the activities of the police officers in securing evidence in the instant case, and those activities of police officers which have been held to infringe the rights guaranteed to an accused by the Fourteenth Amendment. They did nothing which can be said to offend a sense of justice. There was no coerced confession such as that condemned in cases such as *Chambers v. Florida,* 309 U. S. 227, *supra;* no fraud used in gaining evidence; and no brutal physical force used such as that condemned in *Rochin v. California,* 342 U. S. 165, *supra;* and no other

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means of securing evidence used which has yet been held to infringe the right to a fair trial guaranteed by the Fourteenth Amendment.

The respondent submits, therefore, that the petitioner here was accorded the due process of law secured to him by the Fourteenth Amendment.

C. The Search and Seizure at the Time of the Arrest Was Incident to a Valid Arrest and Was Therefore Not an Unreasonable Search and Seizure.

On November 5, 1951, Irvine voluntarily caused to be filed in the Office of the Collector of Internal Revenue at Los Angeles a "Special Tax Return and Application for Registry-Wagering." [People's Ex. 63.]

In the application he gave his name as "Patrick E. Irvine"; business address, none; residence address, "3916 E. Second Street, Long Beach, California." He designated himself as the owner of the business of receiving wagers with one employee namely, Morris Lippe. The period to be covered by the return was "November 1951 to June 30, 1952." He paid a tax of $33.34. He filed a subsequent return on January 2, 1952. [People's Ex. 64.]

On November 1, 1951, Morris Lippe filed a similar return in which he stated that he was engaged in the business of accepting wagers for and on behalf of Patrick E. Irvine. [People's Ex. 67.]

These returns were filed in accordance with the provisions of Sections 3285, 3291, etc., of Title 26, U. S. C.

These returns were to all intents and purposes public records in the office of the Collector of Internal Revenue and open to inspection by law enforcement agencies (Tit. 26, U. S. C., Secs. 3292 and 3275.)

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By filing these returns Irvine and his employee Lippe served notice on the law enforcement agencies that they intended to engage in the commission of a felony in Los Angeles County and in all likelihood at the premises 3916 E. Second Street, Long Beach.

With this information at hand the law enforcement agencies had reason to believe that sooner or later Irvine would commit acts which would violate Section 337a of the *Penal Code of California,* a felony, and that these acts would be committed in conjunction with his employee Lippe.

On two occasions officers observed Lippe drive to and enter the premises at 3916 E. Second Street, Long Beach, which they knew were occupied by Irvine.

They then arranged the installation of a microphone in the premises (no wires were tapped) and overhead Lippe and Irvine discussing horse racing and receiving and placing bets over the telephone.

On January 3 and 4, 1951, the officers observed a Mr. Curti enter Irvine's place of business. Curti was a known professional gambler. [People's Ex. 71.]

The officers then devised the plan which led to Irvine's arrest on January 5, 1951, and the subsequent search and seizure of the papers subsequently used in evidence.

In executing this operation the officers engaged in no physical force or coercion.

Up to this point the officers did not have positive evidence that a crime was being committed by Irvine.

The possession of the incriminating papers by Curti in his automobile did not constitute a violation of Section 337a of the Penal Code of California. But if these papers

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came into the possession of Irvine in the premises at 3916 E. Second Street, such facts would be a violation of the section.

The success or failure of the endeavors of the officers depended on their finding Irvine in a room with the betting registers. (*Penal Code,* Sec. 337a.)

The impossibility of getting an accurate description of the papers in Curti's car under the circumstances and at that hour of the evening, making an affidavit and securing a search warrant is obvious.

But the officers did have reason to believe that Irvine then had possession of betting registers in one of the rooms at 3916 E. Second Street.

We contend that the search and seizure complained of was a reasonable search and seizure for two reasons: (1) the entry was made for the purpose of arresting Irvine and (2) the seizure was an incident to the arrest of Irvine who the officers have reasonable cause to believe was committing a felony.

The facts on which our contentions are based appear in the record and have been narrated above.

A peace officer may make an arrest without a warrant when he has reasonable cause to believe that the person to be arrested has committed a felony. (*Penal Code,* Sec. 836.) The question of reasonable and probable cause must be measured by the facts presented to the officer at the time he required to act. (*People v. Hupp,* 61 Cal. App. 2d 447.)

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In endeavoring to make a lawful arrest a peace officer may break the door or window of the house in which the officers have reasonable grounds for believing the person sought to be arrested is located. (*Penal Code,* Sec. 844.)

Upon making an entry for the purpose of making a lawful arrest the officers may search the person arrested and any premises under his control.

If after making a lawful entry the officers observe a crime being committed in their presence they may arrest the perpetrator and search him and the premises under his control.

In the instant case the officers had reason to believe that Irvine had committed a felony and was in the premises. They had a right to break and enter in an endeavor to apprehend him. They did so and discovered him committing a felony in their presence. They arrested him, searched the premises and seized the contraband.

This was a reasonable search and seizure and not one in violation of the guaranty against *unreasonable* searches and seizures.

In a similar case, *Harris v. United States,* 331 U. S. 145, 150-152, the Supreme Court of the United States held:

> ". . . This Court has also pointed out that it is only *unreasonable* searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and cir-

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cumstances.' Go-Bart Importing Co. v. United States, 282 U. S. 344, 357 (1931).

"The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. *Search and seizure incident to lawful arrest* is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

"The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in Agnello v. United States, *supra,* at 30, it was said: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.' It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.

"Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested." (Emphasis added.)

Further citation of authority is unnecessary.

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V.

No Telephone Communications Were Intercepted Here, so There Is No Occasion to Consider the Case of Schwartz v. Texas, 344 U. S. 199.

The petitioner contends that evidence introduced in the instant case was secured by wire tapping; that the use of information secured by wire tapping for any purpose has been condemned by Congress (47 U. S. C. 605), and by California (Cal. Penal Code, Sec. 640); and that therefore the evidence secured by that method here was inadmissible. He asks this court to overrule the recent case of *Schwartz v. Texas,* 344 U. S. 199, and hold that the federal law requires exclusion of such evidence in state courts.

None of the evidence here was secured by wire tapping, and there is no evidence whatsoever that any telephones were tapped in the investigation of the crimes in which the petitioner was involved.

The evidence shows that there was nothing connected to the telephone instrument or lines in the petitioner's home, and that the equipment which was installed there was not capable of transmitting what was said by those telephoning to his house, unless the voice came out of the receiver so loud that it could be picked up by the microphone in the room. [Rep. Tr. pp. 50, 51.] Police Officer Hermansen, who testified to almost all of the conversations heard over the loudspeaker, testified that he had never heard both ends of any telephone conversation from the petitioner's home. [Rep. Tr. p. 272.] It did not appear that any other witness had heard both ends of any such conversation. The evidence shows only that the police heard, through the microphone installed in the petitioner's house

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on several occasions, a telephone ringing or being dialed, and then a voice talking. Listening to the words spoken into the telephone receiver, in such absence of a physical connection with the telephone wires, is not an interception of a wire communication within the meaning of 47 U. S. C., Section 605 (*Goldman v. United States,* 316 U. S. 129, 133-135), nor within the meaning of California Penal Code, Section 640. (*People v. Sica,* 112 Cal. App. 2d 574, 586.)

There is, therefore, no reason for this court to consider or reconsider the matters determined in the *Schwartz* case (344 U. S. 199), *supra.*

Conclusion.

"Due process" is a precious thing.

The day was and still is when it can be used as a defense for the innocent.

But of late it has too often been used as a subterfuge to delay the justice feared by the felon. Irvine has no defense to the charge of which he now stands convicted except "that the constable blundered."

Even if the precious guarantee was infringed this court cannot interfere in this case.

> ". . . It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."
>
> *Stein v. New York,* 346 U. S. 156, 186.

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We feel that the final words of Mr. Justice Jackson in the *Stein* case are an appropriate conclusion to this brief.

> "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty."
>
> *Stein v. New York,* 346 U. S. 156, 196.

The judgments of the California Court should be affirmed.

Respectfully submitted,

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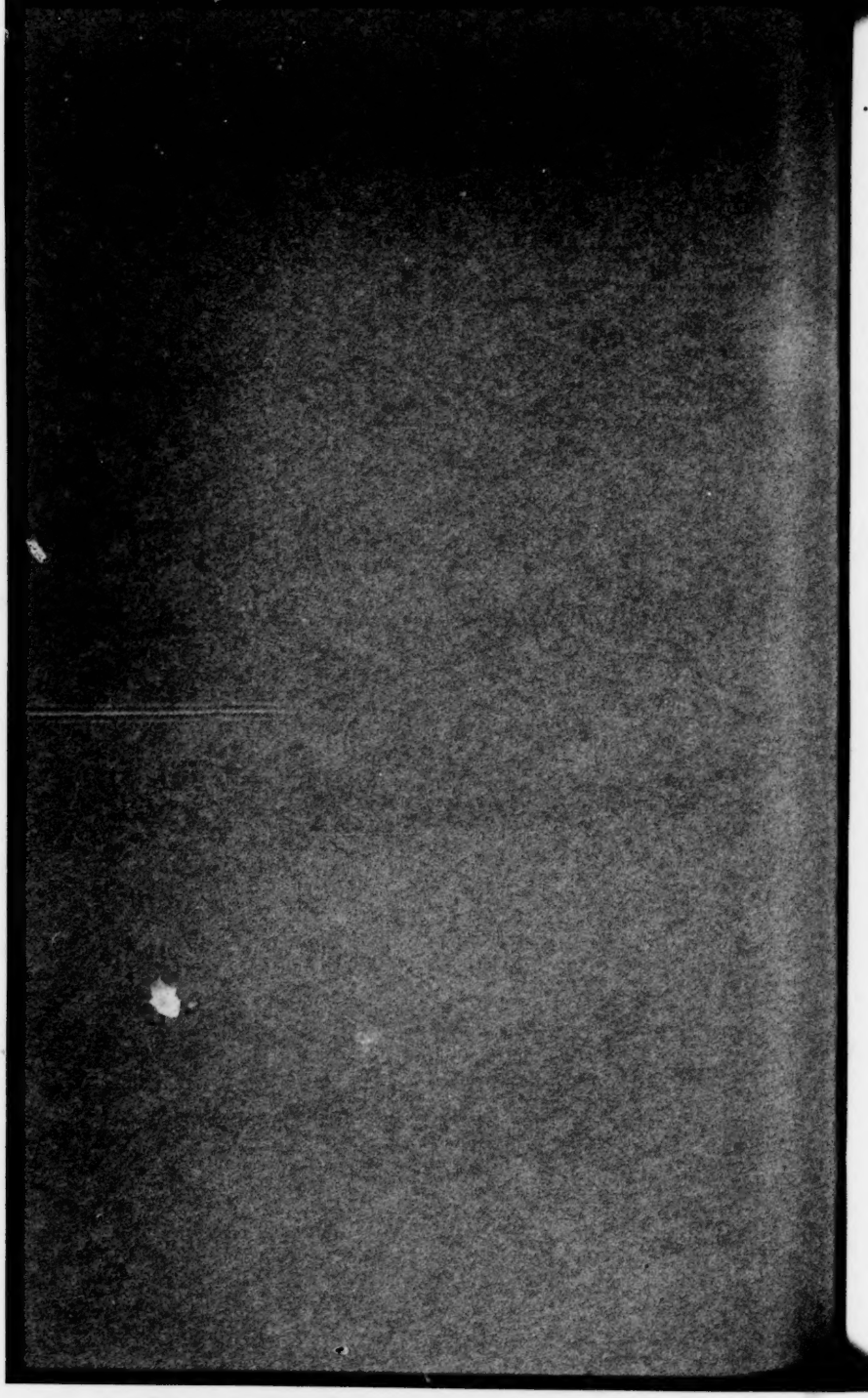

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APPENDIX.

UNITED STATES CONSTITUTION.

ARTICLE VI.

Section 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

. . .

AMENDMENT IV.

Section 1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

Section 1. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

. . .

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AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 UNITED STATES CODE (Supp. V).

CHAPTER 27A—WAGERING TAXES (NEW).

§3285. Tax.

(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions. For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization ex-

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empt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

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§3286. Credits and refunds.

(a) No overpayment of tax under this subchapter shall be credited or refunded (otherwise than under subsection (b)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Secretary, (1) that he has not collected (whether as a separate charge or otherwise) the amount of the tax from the person who placed the wager on which the tax was imposed, or (2) that he has repaid the amount of the tax to the person who placed such wager, or unless he files with the Secretary written consent of the person who placed such wager to the allowance of the credit or the making of the refund. In the case of any laid-off wager, no overpayment of tax under this subchapter shall be so credited or refunded to the person with whom such laid-off wager was placed unless he establishes, in accordance with regulations prescribed by the Secretary, that the provisions of the preceding sentence have been complied with both with respect to the person who placed the laid-off wager with him and with respect to the person who placed the original wager.

(b) Where any taxpayer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit against the tax imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount. Such credit or refund shall be in an amount which bears the same ratio to the amount of tax which such taxpayer paid under this subchapter on the original wager as the amount so laid off bears to the amount of the original wager. Credit or refund under this subsection shall be allowed or made only in accordance with regulations prescribed by the Secretary; and no interest

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shall be allowed with respect to any amount so credited or refunded. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3287. Certain provisions made applicable.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

SUBCHAPTER B—OCCUPATIONAL TAX.

§3290. Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3291. Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

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(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3292. Certain provisions made applicable.

Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3293. Posting.

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request; to any officer or employee of the Bureau of Internal Revenue. (Added Oct. 20, 1951, c. 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

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§3294. Penalties.

(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

(b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

SUBCHAPTER C—MISCELLANEOUS PROVISIONS.

§3297. Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3298. Inspection of books.

Notwithstanding section 3631, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the

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enforcement of this chapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

26 U. S. C. §3275. List of special taxpayers for public inspection.

(a) In collector's office. Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged.

26 U. S. C. §3276. Application of state laws.

The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

47 U. S. C. §605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or

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publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: PROVIDED, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 9, 1934, c. 652, §605, 48 Stat. 1103.)

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California Constitution.

Article I.

Sec. 19. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. (Constitution of 1849, Art. I, Sec. 19.)

California Penal Code.

Section 334. Witness' privilege. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified. (Enacted 1872.)

Section 337a. . . . Every person,

1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between

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men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this section; or

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6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.

Section 459. . . . Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Section 640. . . . Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who willfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or com-

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munication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from, or received at any place within the state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639. . . .

CALIFORNIA PENAL CODE.

§836. Arrests by peace-officers: (Arrest under warrant or without warrant in certain cases authorized). A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

5. At night, when there is reasonable cause to believe that he has committed a felony. (Enacted 1872.)

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CALIFORNIA PENAL CODE.

§844. (Door or window may be broken in making arrest, when.) To make an arrest, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired. (Enacted 1872; Am. Code Amdts. 1873-74, p. 435.)

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